92-1116

Supreme Court, U.S.
FILED
DEC 23 1992
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ANTHONY ORTIZ,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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42 pg

QUESTION PRESENTED

WHETHER THE ILLINOIS SUPREME COURT ERRED IN FINDING THE TRIAL COURT'S DISMISSAL THE FUNCTIONAL EQUIVALENT OF A MISTRIAL PERMITTING A RETRIAL CONSISTENT WITH THE DOUBLE JEOPARDY CLAUSE WHERE, IN THE ORIGINAL TRIAL, THE STATE HAD PRESENTED THREE WITNESSES IN A CRIMINAL BENCH TRIAL BUT WAS UNPREPARED DUE TO ITS NEGLIGENCE TO PRESENT ANY FURTHER EVIDENCE AND ITS MOTION FOR A CONTINUANCE HAD BEEN DENIED BY THE TRIAL COURT.

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The Petitioner, Anthony Ortiz, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois, entered in the above-entitled proceeding on September 24, 1992.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported at 151 Ill.2d 1, 600 N.E.2d 1153 (1992), and is reprinted as Appendix A. The opinion of the Appellate Court of Illinois, Third District, is reported at 207 Ill.App.3d 569, 566 N.E.2d 1 (1990), and is reprinted as Appendix B.

JURISDICTION

On September 29, 1989, Petitioner was found guilty of two counts of aggravated criminal sexual assault by the Circuit Court for the Fourteenth Judicial Circuit, Whiteside County, Illinois. Pursuant to Rule 604(b) of the Rules of the Supreme Court of Illinois, Petitioner appealed that judgment to the Illinois Appellate Court, Third District. That court reversed the judgment on November 20, 1990. Pursuant to Rule 315 of the Rules of the Supreme Court of Illinois, The People of the State of Illinois appealed the Appellate Court's decision to the Supreme Court of Illinois. On September 24, 1992, the Supreme Court of Illinois reversed the order of the Appellate Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF CASE

Petitioner, Anthony Ortiz, was charged in the Circuit Court of Whiteside County by information of two counts of aggravated criminal sexual abuse in violation of Ill.Rev. Stats. ch. 38, par. 12-16(c)(1) by having fondled the buttocks and body of a child (Count I) and by having allowed the child to touch his penis (Count II). Petitioner entered a plea of not guilty to the charge against him and waived his right to a jury trial, demanding a trial before a judge. After two continuances, the matter proceeded to a bench trial on April 24, 1989, before the Honorable Wilbur S. Johnson.

At trial the State announced itself ready and made certain pre-trial motions. Opening arguments were had by both the Assistant State's Attorney, Vicki Wright and the defense attorney, Marvin Ripley. The State then called its first witness, Anita Johnson who, after being sworn, testified that she was a nurse employed at Willard School and was present on May 26, 1988, when a child assault program was presented to third, fourth, and fifth grade levels at the school. She testified that after the program one of the fourth graders, the Complainant, had come to speak to her and told her that while Complainant had been in bed with her mother, her stepfather, who was then her mother's boyfriend had crawled into bed while drunk and had taken his hand and slid it down the front of her panties and had taken her hand and put it down the front of his pants. On cross examination by the defense, a report written by the witness was marked as a defense exhibit and was admitted into evidence on behalf of the defense without objection by the State.

The State next called Stacey who testified that she was a classmate of the Complainant when they were both in fourth grade and that on "one specific evening" when Complainant's mother had picked her up after a Friday night swim, she had received a telephone call from Complainant who was crying and stated that she was scared that her mother's boyfriend might do something to her. The witness testified that Complainant had told her that at that time she was in a bathroom or her bedroom with the door locked. The testimony that Complainant was in a locked room was emphasized during cross examination by the defense.

The third witness to be called by the State was Gail Ortiz, the mother of the Complainant and wife of the Petitioner. She testified that at the time of trial her daughter was ten years old and her husband was forty-four years of age. She testified that during the course of her relationship with Petitioner he had become drunk on four or five occasions and that on one such occasion she had in fact taken her daughter to a Friday night swim with her daughter's girlfriends. On that night Petitioner had been at a tavern drinking.

Before Assistant State's Attorney Wright announced the direct examination as concluded the following ensued:

> "MS. WRIGHT (Assistant State's Attorney): May I approach the bench. The victim is in school in Pekin, Illinois. They knew that the court date was today. I think her father must have forgotten the date. I don't know why she isn't here. Do you want me to continue with this witness?
>
> MR. RIPLEY (Defense Attorney): If they are not going to put the victim on, then I will make a motion to dismiss.

THE COURT: I was going to recess after this witness and then resume at 1:00 o'clock. If she is in school, you would not be able to get the witness here.

MS. WRIGHT: The last continuance was because we hadn't gotten discovery. I don't like to ask for a continuance.

THE COURT: You can't. You may step down at this time.

(A short recess was taken).

MS. WRIGHT: At this time for the purposes of the record, we would request a continuance as our victim witness is unavailable and cannot be here until 2:30. It is now 11:45 A.M.

MR. RIPLEY: I will object to the motion to continue the case. At the same time I am requesting that the matter be dismissed. The State has long had an opportunity to prepare this case which was filed last October and called for trial this date. The defendant is in jeopardy, and if the Court (sic) cannot produce its witness in a timely fashion on the day of trial, then I would request that the case be dismissed.

THE COURT: The motion to dismiss is heard and allowed. Mr. Ripley, you have Defendant's Exhibit No. 1 which was admitted?

MR. RIPLEY: Yes.

THE COURT: Do you want to withdraw it?

MR. RIPLEY: I will withdraw it.

(Which was all the evidence offered and received and all other proceedings had in the hearing in the above cause.)" (R. 67-68.)

Subsequent to the dismissal of the proceedings, the State filed a Motion to Reconsider and set the matter for a hearing. The hearing was set before the same trial judge and in support of its motion, the State presented the

natural father of Complainant who testified that he and his daughter were present for trial at the time the matter had been previously set and had been told that it had been continued to a new date. He testified that he and his daughter were not present for trial because of his own confusion as to the new trial date. He and his daughter resided in Pekin, Illinois, 108 miles from the place of trial. On the trial date, at 11:25 a.m. he received a phone call from the State's Attorney's office informing him of his mistake at which time he stated he would have his daughter present at court in two and one-half hours. On cross examination he admitted that neither he nor his daughter had received a subpoena requiring their appearance either at the April 24, 1989, trial date or the prior April 14, 1989, trial date.

Susan Noble, a staff assistant with the State's Attorney's office, whose job included informing witnesses when to be present at court, testified that there were four witnesses present on the morning of trial but that at 10:30 a.m. she was informed by the prosecutor that the Complainant was not present after which she made phone calls to locate the Complainant.

After the presentation of argument, the court "reinstated" the charges after admonishing the prosecutor that: "* * * this is your chief witness and to be looking for them at 10:30 or 11:00 a.m. after the trial has actually commenced is not much of a way to run a trial." (R. 85.)

Pursuant to notice by the State, the matter was set for new trial before a different trial judge, the Honorable John Donald O'Shea and trial commenced one month later. The defense made an oral motion citing the Double Jeopardy Clause of the United States Constitution to dismiss the case on grounds that the Petitioner had previously been put in jeopardy during the April bench trial and that

the dismissal "was not in the nature of a mistrial but rather adjudication on the facts". (R. 89.) The trial judge denied the motion stating that he would leave the matter to an appellate court if defendant were convicted.

At the second trial the State again called Nurse Johnson and Gail Ortiz as it had previously but the State did not call Stacey nor did any of the State's evidence mention the phone call or locked door to which Stacey had testified. Also testifying were two police investigators and the Complainant herself.

Petitioner was convicted and sentenced to probation. His conviction was reversed by the Illinois Appellate Court. The Appellate Court was thereafter reversed by the Illinois Supreme Court in a decision dated September 24, 1992.

REASON FOR GRANTING THE WRIT

THE ILLINOIS SUPREME COURT ERRED IN FINDING THE TRIAL COURT'S DISMISSAL THE FUNCTIONAL EQUIVALENT OF A MISTRIAL PERMITTING A RETRIAL CONSISTENT WITH THE DOUBLE JEOPARDY CLAUSE WHERE, IN THE ORIGINAL TRIAL, THE STATE HAD PRESENTED THREE WITNESSES IN A CRIMINAL BENCH TRIAL BUT WAS UNPREPARED DUE TO ITS NEGLIGENCE TO PRESENT ANY FURTHER EVIDENCE AND ITS MOTION FOR A CONTINUANCE HAD BEEN DENIED BY THE TRIAL COURT.

Those of the bench and bar of rural Whiteside County, Illinois, earnestly attempting to follow this Honorable Court's guidelines for enforcing the Double Jeopardy Clause are confronted with a doctrine containing often subtle

distinctions which can easily become confusing even to the most perspicuous. The Illinois Supreme Court has now compounded any such confusion by its decision in this case construing a dismissal for insufficient evidence as a functional equivalent of a mistrial under the guise of following the dictates of this Honorable Court, and by effectively holding that a defense objection to a continuance which should have been granted removes the double jeopardy barrier to retrial, and by applying a manifest necessity standard to defense requested dismissals.

Petitioner in the case at bar was charged with a sex crime to a child and during the bench trial, while the State's third witness was testifying on direct examination, the prosecutor requested a continuance stating: "The victim is in school in Pekin (100 miles away) * * * I don't know why she isn't here." The defense attorney responded: "If they are not going to put the victim on, then I will make a motion to dismiss." The court responded: "If she is in school, you would not be able to get the witness here." The prosecutor then requested a continuance which was denied. After a short recess the prosecutor again requested "for the purposes of the record" a continuance on grounds that the witness was unavailable to which the defense objected stating "The defendant is in jeopardy, and if the (State) cannot produce its witness in a timely fashion on the day of trial, then I would request that the case be dismissed." The dismissal was granted.

Subsequently on motion by the State and after admonishing the prosecutor for her negligence, the court reinstated the charge and the matter was set before a different judge who denied the double jeopardy claim stating that he would leave the matter to an appellate court. Defendant was convicted but his conviction was reversed on appeal by the Illinois Appellate Court which ruled:

> "What is relevant is that Defendant had been placed in jeopardy and some evidence against him had been presented when the proceeding unexpectedly ground to a halt. The court, having determined not to grant the State's motion for a continuance, granted Defendant's motion to "dismiss". In effect, the court acquitted Defendant for lack of evidence sufficient to convict * * *."

On appeal to the Illinois Supreme Court, the State argued a distinction between procedural and substantive dismissals claiming that this case fit into the former category; for want of prosecution. The State therefore argued that retrial was Constitutionally permissible based on the claim that the prosecutor had never rested and the court therefore had made no adjudication of merit. The defense argued in that court as it would now before this Honorable Court that the dismissal was for insufficient evidence to convict. The prosecutor chose to stand on her motion to continue as a *sine qua non* to the matter at a point in which her evidence was wholly insufficient to convict.

The Illinois Supreme Court, however, rejected both views and found "in reading the record" the defense motion and resulting order was not a dismissal at all but was "functionally indistinguishable from a declaration of mistrial" citing this Honorable Court's language in *Lee v. United States* (1977), 432 U.S. 23, 31, 97 S.Ct. 2141, 53 L.Ed. 2d 80. Purporting to follow *Lee* the Court focused on whether the order contemplated an end to all prosecution of defendant for the offense charged and determined that because "the trial court reversed its decision later [,w]e can only discern from the record that the trial court did not contemplate that its actions would bar reprosecution."

In *Lee*, the State filed an untimely motion to dismiss for a defective information which motion should have and

could have been filed earlier. The trial court's midtrial dismissal was not based on any facts presented during trial but only on the defect in language contained in the information. Clearly were the first trial to go to judgment, later on appeal, the case would have had to have been reversed and remanded for a new trial—not for reasons of factual merit but only for unrelated technicality. In ruling the dismissal the functional equivalent of a declaration of mistrial, this Court emphasized a distinction between *Lee* and *United States v. Jenkins* (1975), 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed. 2d 250. In *Jenkins*, the trial court's dismissal in defendant's favor was based in part on trial evidence presented. The distinguishing feature of *Jenkins* was thus the trial court's resolution in defendant's favor that he could not be convicted of the offense charged.

Clearly, the *Lee-Jenkins* dichotomy is intended to focus analysis to the nature of the order terminating the proceedings. The critical question of *Lee* of whether the order contemplated an end to all prosecution of the defendant for the offense is a means of analysis.

This means of analysis, however, the Illinois Supreme Court failed to follow in the instant case. While the Illinois Supreme Court asserted the analytical framework of *Lee* the application of such framework was superficial at best. The Illinois Supreme Court determined that the order did not contemplate an end to all prosecution of the defendant for the offense charged because the trial court had subsequently reversed its order terminating trial. Logically if prosecution were dependent on a reversal of an order terminating trial, that order, of necessity, must have been a bar to such further prosecution. Had the dismissal not been perceived by the court and the parties as a bar to further prosecution, the State would not have

moved for a reconsideration of the termination and the court would have had no need to reconsider.

The motion of the defense and the order of the court could not have involved a mistrial, functionally or otherwise, contrary to the conclusion of the Illinois Supreme Court. It is absurd to suggest that the defense asserted and the trial court intended a mistrial to give the State the opportunity to continue the cause anew when, in fact, the defense objected to, and the trial court denied, the State's motion for a midtrial continuance. A mistrial remedies some defect undermining the fairness of the trial which cannot otherwise be remedied. (*Illinois v. Somerville* (1973), 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed. 2d 425.) Here the defect, the unavailable witness, could have been remedied by a continuance within the discretion of the trial judge. It is submitted that whether the trial judge was right or wrong in denying the State the continuance requested, is irrelevant to the application of the Double Jeopardy Clause. Yet the Illinois Supreme Court characterized the trial court's failure to grant a continuance as a reason to find the dismissal the functional equivalent of a declaration of mistrial. Blame also was fixed on Petitioner for objecting to the continuance:

> "If the defendant had forced the State to proceed with its proof, it would almost certainly not have been useless. The State might not have persuaded the court of Defendant's guilt. In that situation there would be no doubt that double jeopardy had attached."

By thus, "wrongfully" objecting to the State's continuance, the Illinois Supreme Court has held Petitioner to have removed the barrier of double jeopardy. To have objected to a continuance which the Supreme Court felt ought to have been granted, is now held, in Illinois, to have removed double jeopardy protection. Petitioner submits that this result oriented analysis has no foundation

in precedent but will further confuse an already difficult doctrine unless this Honorable Court grants this review.

Moreover, confusion in Illinois can only be compounded by the Illinois Supreme Court's further application of mistrial principles. Citing *Downum v. United States* (1963), 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed. 2d 100 and the *United States v. Jorn* (1971), 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed. 2d 543, the Court found no "manifest necessity" for the trial judge to dismiss the case. *Jorn* may be understood as holding that error of the trial court in declaring a mistrial which was not requested by the defense would not remove the barrier to retrial under the Double Jeopardy Clause. *Downum* has been understood to hold that a prosecutor's negligence resulting in the unavailability of a witness would not justify a mistrial requested by the State and therefore prevented a retrial of defendant. *See also, Illinois v. Somerville* (1973), 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed. 2d 425.

The Illinois Supreme Court has turned these cases on their heads to rule as it did that there must have been a manifest necessity to grant Petitioner a "dismissal." The manifest necessity standard has been used to define those instances where a declaration of mistrial would not prevent a retrial although jeopardy had attached. (*United States v. Perez* (1824), 22 U.S. 579, 6 L.Ed. 165.) But as applied by the Illinois Supreme Court, this standard appears as a new limit on the Double Jeopardy Clause. That is, the State is permitted to retry a defendant following a dismissal unless the defense can show that the dismissal was a manifest necessity.

Given the misreading and misapplication of this Honorable Court's guidelines to the application of the Double Jeopardy Clause this matter should now be reviewed.

CONCLUSION

For the foregoing reason it is respectfully requested that a Writ of Certiorari issue in the above-captioned cause to the Illinois Supreme Court.

Respectfully submitted,

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APPENDICES

APPENDIX A

[FILED SEPT. 24, 1992]

Docket No. 71297—Agenda 23—September 1991.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellant,
v. ANTHONY ORTIZ, Appellee.

JUSTICE CUNNINGHAM delivered the opinion of the court:

On October 27, 1988, an information was filed in Whiteside County charging defendant, Anthony Ortiz, with two counts of aggravated sexual abuse of his then-girlfriend's nine-year-old daughter. At the bench trial, and after several witnesses had testified, defense counsel moved for dismissal because the State's Attorney stated that the chief witness was not in the courthouse and would not be available for two hours. The trial court denied the State's motion for continuance and granted defendant's motion to dismiss. The State filed a motion to reconsider. The circuit court granted the motion. At a subsequent trial, conducted by a new judge, the circuit court found defendant guilty. Defendant appealed.

The appellate court reversed the judgment of the circuit court and vacated defendant's conviction. (207 Ill. App. 3d 569.) From this judgment, the State appeals, raising only one issue: whether double jeopardy attached, preventing the second trial and conviction. We reverse.

The facts are as follows. After the information was filed on October 31, 1988, the trial court ordered the parties to produce discovery within 28 days. On February 6, 1989, the defendant entered a plea of not guilty, a waiver of a jury trial, and a demand for a bench trial. The bench trial was scheduled for February 24, 1989, at 10:30 a.m.

On February 21, 1989, the State and defendant filed a joint motion for a continuance. The trial court granted the motion and scheduled the bench trial for April 14, 1989, at 10:30 a.m.

At the next trial setting of April 14, 1989, all parties were present for the bench trial. However, the State filed a motion to compel discovery and a continuance attributable to the defendant for failure to produce discovery. In reply to the State's motion to comply with discovery, defendant tendered discovery on the trial date. The trial court granted the motion to continue and attributed the continuance to defendant. The State withdrew its motion to compel discovery. The trial court continued the trial to Monday, April 24, 1989, at 11 a.m.

On April 24, 1989, the case proceeded to trial. After opening statements by the State and the defense, the State proceeded to call its witnesses.

The first witness was Anita Johnson, a registered nurse for the Unit 5 school district at Willard School. She stated that the victim attended Willard School at the time of the incident. She was present when an organization through the YWCA made a presentation to the third, fourth and fifth grades at the school. The Child Assault Program workers presented the program. The program used role playing to describe situations where a child would be uncomfortable, e.g., the classroom bully or the very affectionate uncle. Johnson was present during the presentation.

After the presentation, the victim initially spoke to a Child Assault Program worker. Johnson was then called in to talk to the victim. At that time, the victim related to Johnson that her mother's boyfriend, the defendant, had come home drunk one night, crawled into bed, took his hand and slid it down the front of her panties. He

also took her hand and put it down the front of his pants. Johnson stated that the victim was very upset as she told her about the incident. Johnson stated that the victim's head was down and that she was fighting back tears. The victim was also very uncomfortable. Johnson stated that she filed a report with the Department of Children and Family Services by calling the hotline and submitting a written report.

Johnson was familiar with the victim, who was nine years old and in the fourth grade. Johnson had known the victim for one school year. During that time, she saw the victim interact with other children about once or twice a week. Prior to the victim's revelations, Johnson had seen the victim a few times for playground-type injuries.

Stacey Lawrence testified next. She stated that she was 10 years old and in the fifth grade. She knew the victim because they were in the fourth grade together, but with different teachers. She stated that the victim was her friend.

She recalled one Friday evening during which the victim's mother picked up her and two other friends (Tricia and Zenia) at the recreation center and took them home. The defendant was not with the victim's mother. She recalled arriving home at 9:15 p.m. At approximately 11 or 11:30 p.m. that evening, she received a phone call from the victim. The victim started to talk for a while and then she started to cry. After the victim cried, she talked for about 15 minutes. The victim told her that she was home alone and that her mother and defendant were about to arrive home. The victim stated that defendant might do something to her. During the phone conversation, the victim stated that she was in the bathroom or in her room with the door locked.

Gail Ortiz testified to the following. She and her daughter moved in with defendant in October 1987. On October 24, 1988, she married the defendant. During the course of their relationship, defendant became drunk on four or five occasions. She recalled one evening in which the defendant started to drink at the VFW. Prior to going to the VFW, she picked up her daughter and took her to the recreational center. She then drove to the VFW in order that defendant could follow her home. After taking defendant's car home, she and defendant went to another bar so he could continue drinking. Gail returned home, but later left to pick up the victim at the center around 9:30 or 10 p.m. After she took her daughter home, she waited for defendant to call for a ride. She picked up defendant at approximately 10 or 10:30 p.m.

While Gail Ortiz was testifying, the State requested to approach the bench. The State told the judge:

> "The victim is in school in Pekin, Illinois. They knew that the court date was today. I think her father must have forgotten the date. I don't know why she isn't here. Do you want me to continue with this witness?"

At that time, defense counsel requested a motion to dismiss. The judge replied that it would recess after Gail Ortiz's testimony until 1 p.m. The court stated further that since the victim was in school, she would not be able to be at the trial. The State replied that its last continuance was because it had not received discovery. The State also stated that it did not want to ask for a continuance. The court replied, "You can't," and told the witness, Gail Ortiz, to step down. After a short recess was taken, the State requested a continuance because the victim could not arrive until 2:30 p.m. and it was 11:45 a.m. Defense counsel objected to the motion and requested a motion to dismiss because "the State has long had an opportunity

to prepare this case which was filed last October and called for trial this date. The defendant is in jeopardy, and if the State cannot produce its witness in a timely fashion on the day of trial, then I would request that the case be dismissed." The court stated: "The motion to dismiss is heard and allowed."

Four days later, on April 28, 1989, the court held a hearing on the State's motion to reconsider the order dismissing the cause and denying its request for continuance. Defense counsel waived presence of defendant at the hearing.

The first witness called to testify was Darryl Alcorn, father of the victim. He stated that he recalled that a bench trial was set for April 14, 1989; however, the case was continued. He stated that the victim was present prior to testimony beginning on April 14. However, the State's Attorney advised him that the trial was continued. At that time, he even wrote the new trial date of April 24 in a book entitled "King's Fools." He stated that since he resided in Pekin, Illinois, with his daughter, approximately 108 miles from Morrison, it would take approximately 1 hour and 45 minutes to drive the distance and two hours if he obeyed the speed limit.

He stated that on April 14 he was so nervous and upset that although he wrote down the 24th, he only recalled hearing the new trial date was in two weeks. Thus, he began to think of the next trial date as the 28th instead of the 24th. He even went to work and asked for the 28th off. He was surprised when the State's Attorney's office called at 11:25 a.m. on the 24th and told him to come into court. At that time, he was willing to bring his daughter to court, but he would arrive in 2½ hours. The victim was still willing to testify.

Susan Noble, a victim assistant for the Whiteside County State's Attorney's office, stated that on the date of the trial she was aware of four witnesses at the courthouse. The witnesses were Stacey Lawrence, Anita Johnson, Ron Posoff and Marie Flosie. Only Lawrence and Johnson had testified at the time of the dismissal. Before trial began, she did attempt to contact Darryl Alcorn at several places. When she contacted the victim's school, she discovered that the victim was still in school. At that point, she told the State's Attorney about the situation. After three to five minutes, she received a phone call from Darryl Alcorn stating that he would come to the courthouse immediately. Although her job is to contact the witnesses to confirm dates and times, she was not sure if she advised Darryl Alcorn that he was to be present on the 24th.

At the close of the testimony, the State argued that the trial court was aware that it was willing to proceed with the case because the witness, Gail Ortiz, had not finished her direct testimony. The State argued that it should have requested a recess and, if the court denied that motion, it should have proceeded with the evidence. The defense responded that it was the State that requested the continuance.

At the conclusion of the hearing, the trial court reinstated the charges, At the second trial, a new judge was assigned. The court found the defendant guilty of two counts of aggravated sexual abuse. Defendant appealed. The appellate court held that under the circumstances double jeopardy attached and, as such, the State was precluded from reprosecuting defendant. The State appeals.

The only issue before this court is whether double jeopardy had attached, thereby preventing the reinstatement of charges and a second trial. The State contends that

the appellate court erroneously held that the trial court's dismissal order was tantamount to an acquittal on the merits, thus barring retrial where the prosecution had not completed its case in chief. In any event, the State was not required to produce the victim in order to prove defendant's guilt beyond a reasonable doubt.

The double jeopardy clause of the United States Constitution, enforceable against the States through the fourteenth amendment, provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." (U.S. Const., amends. V, XIV.) Section 10 of article I of the Illinois Constitution provides the same protection. (Ill.Const. 1970, art. I, § 10.)

> "The Clause * * * guarantees that the State shall not be permitted to make repeated attempts to convict the accused, 'thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' " (*United States v. Martin Linen Supply Co.* (1977), 430 U.S. 564, 569, 51 L.Ed.2d 642, 649, 97 S.Ct. 1349, 1353, quoting *Green v. United States* (1957), 355 U.S. 184, 187-88, 2 L.Ed.2d 199, 204, 78 S.Ct. 221, 223.)

Thus, the doctrine of double jeopardy prevents the reprosecution of persons who are acquitted of a criminal offense. *United States v. Scott* (1978), 437 U.S. 82, 88, 57 L.Ed.2d 65, 72, 98 S.Ct. 2187, 2192.

It is well established that "[t]he traditional rule is that jeopardy attaches in a bench trial when the first witness is sworn and the court begins to hear evidence." (*People v. Deems* (1980), 81 Ill.2d 384, 398.) The State in this case concedes that jeopardy has attached. However, the State contends that those rules governing double jeopardy "should

not be applied mechanically when the interests they protect are not endangered and when their mechanical application would frustrate society's interest in enforcing its criminal laws." (*Deems*, 81 Ill.2d at 388, citing *Illinois v. Somerville* (1973), 410 U.S. 458, 463, 35 L.Ed.2d 425, 430, 93 S.Ct. 1066, 1070.) We agree with that argument and add that " 'the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial.' " *Serfass v. United States* (1975), 420 U.S. 377, 390, 43 L.Ed.2d 265, 275, 95 S.Ct. 1055, 1064, quoting *Somerville*, 410 U.S. at 467, 35 L.Ed.2d at 433, 93 S.Ct. at 1072.

The State argues that the dismissal by the trial court amounted to a dismissal for want of prosecution, "a dismissal that was entirely unwarranted given the facts." The defendant argues the dismissal by the trial court "can only be reasonably construed as relating to the sufficiency of the evidence." Thus, defendant argues that the "order of dismissal was a factual determination of insufficiency of evidence."

The defendant relies on *People v. Bean* (1985), 135 Ill. App.3d 336, for the proposition that when the State elected to stand on its motion to continue, it placed the trial court in a posture of either granting the continuance or terminating the trial due to the insufficiency of the evidence, as requested by the defense. The State's position in *Bean* is parallel to the State's position in this case and, as such, at issue was whether the order was a dismissal of the charge or an acquittal. The *Bean* court held that the order was an acquittal barring reprosecution. However, we find *Bean* inapplicable.

Both parties argue that the motion was a motion to dismiss, understandably granted on different grounds. However, in reading the record, we find that the motion and

the resulting order were "functionally indistinguishable from a declaration of mistrial." (*Lee v. United States* (1977), 432 U.S. 23, 31, 53 L.Ed.2d 80, 87, 97 S.Ct. 2141, 2146.) As such, the questions to be answered upon review are whether the trial court acted properly and whether there was " 'manifest necessity for the act, or the ends of public justice would otherwise be defeated.' " (*People v. Laws* (1963), 29 Ill. 2d 221, 225, quoting *United States v. Perez* (1824), 22 U.S. (Wheat) 579, 580, 6 L.Ed. 165, 165.) However, the overriding concern in view of these questions is not how the motion is labeled but more importantly "whether the order contemplates an end to all prosection of the defendant for the offense charged." (*Lee*, 432 U.S. at 30, 53 L.Ed. 2d at 87, 97 S.Ct. at 2145.) This court can only answer these questions by a thorough reading of the record.

First of all, we note that the one matter which can be said is that "a criminal trial is, even in the best of circumstances, a complicated affair to manage." (*United States v. Jorn* (1971), 400 U.S. 470, 479, 27 L.Ed. 2d 543, 553, 91 S.Ct. 547, 554.) As stated in *Jorn*:

> "[I]t is clear beyond question that the Double Jeopardy Clause does not guarantee a defendant that the Government will be prepared, in all circumstances, to vindicate the social interest in law enforcement through the vehicle of a single proceeding for a given offense." *Jorn*, 400 U.S. at 483-84, 27 L.Ed.2d at 556, 91 S.Ct. at 556.

Nothing in this record suggests that the circumstances were used by the prosecution for the purpose of securing a more favorable hearing or in any way taking advantage of or harassing this defendant. It appears to be one of those circumstances that creeps into a prosecutor's life as a result of inadvertence. In this case, the trial court

failed to express a reason for the dismissal. Furthermore, the trial court did not give full consideration to the possibility of trial continuation. There is no evidence that the victim could not be present; quite to the contrary, the minor would have been available at 2:30 p.m. Gail Ortiz was still on the stand, direct examination had not been completed, and the judge, in reply to defense counsel's motion to dismiss, could have recessed after Ortiz's testimony and reconvened at 1 p.m.

A less drastic alternative was available to the trial judge, which would have allowed the trial to continue. Given the facts available to the judge and his apparent unwillingness to examine the issue in more depth, there does not seem to have been a basis for the judge to grant dismissal. The judge should have considered the alternative to aborting the trial, such as he suggested in the first place: finish with the testimony of Ortiz, recess for lunch and continue at 1 p.m. Unfortunately, he did not go far enough. For all we know, his action may have been his concern for the trial docket. However, the trial court reversed its decision later. We can only discern from the record that the trial court did not contemplate that its actions would bar reprosecution.

Since this court finds the order functionally indistinguishable from a motion for mistrial, we must determine next whether the trial court acted properly. The law is well established:

> "[Although] the ruling of the trial court granting a mistrial is not subject to review in the absence of an abuse of discretion, [citation], * * * 'the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes * * *.' [Citations.]" Laws, 29 Ill.2d at 225.

This court must also determine whether the trial court abused its discretion.

> "[The] doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. [Citation.]
>
> The conscious refusal of this Court to channel the exercise of that discretion according to rules based on categories of circumstances [citation], reflects the elusive nature of the problem presented by judicial action foreclosing the defendant from going to his jury. But that discretion must still be exercised; unquestionably an important factor to be considered is the need to hold litigants on both sides to standards of responsible professional conduct in the clash of an adversary criminal process. * * *
>
> * * * Yet, in the final analysis, the judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, one and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *Jorn*, 400 U.S. at 485-86, 27 L.Ed.2d at 557, 91 S.Ct. at 557-58.

Since this court finds that the circumstances presented are "functionally undistinguishable from a declaration of a mistrial," we find that the trial court abused its discretion when it granted a midtrial dismissal in favor of defendant's motions to dismiss before there was any determination of factual guilt or innocence. When one examines the circumstances surrounding the dismissal of the case, it seems abundantly apparent that the trial judge made no effort to exercise sound discretion. In light of the circumstances, the trial court believed that the only alternative

was to grant a dismissal. There was another alternative in this case and that was to grant a recess and reconvene at 1 p.m., thereby giving the victim and her father time to arrive at the courthouse.

If the defendant had forced the State to proceed with its proof, it would almost certainly not have been useless. The state might not have persuaded the court of defendant's guilt. In that situation, there would be no doubt that double jeopardy had attached. Thus, we find that the trial court acted in haste without reflection upon the fact that two witnesses were yet to testify and one witness had yet to finish her testimony, in addition to the lunch break to be taken soon. At most, the facts show that the prosecutor's failure to have the crucial witness, the victim, present was negligent oversight. But, immediate steps were taken to correct this oversight through the efforts of Susan Noble, victim assistant, who contacted the father of the victim. The father promised that his daughter would be at the courthouse by 2:30 p.m. that day. There was no manifest necessity for the trial judge to dismiss the case. See *Downum v. United States* (1963), 372 U.S. 734, 10 L.Ed.2d 100, 83 S.Ct. 1033; *United States v. Jorn* (1971), 400 U.S. 470, 27 L.Ed.2d 543, 91 S.Ct. 547.

Another aspect of a motion for mistrial is whether the "error"—failure to have the victim at trial—was motivated by bad faith or undertaken to harass or prejudice. (*Lee*, 432 U.S. at 33, 53 L.Ed.2d at 89, 97 S.Ct. at 2147.) As stated in *Lee*:

> "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "bad-faith conduct by judge or prosecutor," [citation] threatens

> the "[h]arrassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecutor of more favorable opportunity to convict" the defendant. [Citation.]' " *Lee*, 432 U.S. at 33, 53 L. Ed. 2d at 89, 97 S. Ct. at 2147, quoting *United States v. Dinitz* (1976), 424 U.S. 600, 611, 47 L. Ed. 2d 267, 276, 96 S. Ct. 1075, 1081.

It is quite true that the State, with all of its resources and power, should not be able to make repeated attempts to convict an individual for an alleged offense. The truth is expressed in three common law pleas, *autrefois acquit* (formerly acquitted), *autrefois convict* (formerly convicted), and pardoned (pardoned for the same offense), which lie at the core of the area protected by the double jeopardy clause. *Scott*, 437 U.S. at 87, 57 L. Ed. 2d at 71, 98 S. Ct. at 2192.

But, this case is a far cry from the situation in the present case, where the State is quite willing to continue with its production of evidence to the defendant's guilt before the trier of fact (judge). A short recess was all that was requested, although inartfully by the prosecutor. The defendant in this case, however, seeks termination in mid-trial on grounds unrelated to guilty or innocence. To quote the Supreme Court in *Scott*, 437 U.S. at 96, 57 L. Ed. 2d at 77, 98 S. Ct. at 2196, "This is scarcely a picture of an all-powerful State relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilty submitted to the first trier of fact. It is instead a picture of a defendant who chooses to avoid conviction and imprisonment, not because of his assertion that the Government has failed to make out a case against him, but because" of the failure of the victim to be present at the outset of the trial, but who would have been available at 2:30 p.m. Thus the trial court acted properly when it took the opportunity

to correct its ruling on dismissing the case after hearing testimony.

We find that the trial court abused its discretion when it granted defendant's motion to dismiss. There did not exist any manifest necessity to grant the midtrial dismissal. For the foregoing reasons, we reverse the judgment of the appellate court and affirm the judgment of the circuit court.

JUSTICE HEIPLE, dissenting:

Since the principle of double jeopardy precludes the defendant's reprosecution, I respectfully dissent. U.S. Const., amends. V, XIV; Ill. Const. 1970, art. I, §10.

Defendant, Anthony Ortiz, was charged with two counts of aggravated criminal sexual abuse. Defendant waived his right to a jury trial and, on April 24, 1989, the case proceeding to a bench trial. Following opening statements by the State and the defense, the State proceeded to call its witnesses. Anita Johnson testified first and Stacey Lawrence testified second. The victim's mother, Gail Ortiz, then took the stand to testify. Midway through the mother's testimony, the State informed the court that the nine-year-old victim was not available to testify because her father had confused the trial date and he could not have her at the courthouse for another 2½ hours. The State then requested a continuance and defense moved for a dismissal on the following grounds:

> "The State has long had an opportunity to prepare this case which was filed last October and called for this trial date. The defendant is in jeopardy, and if the State cannot produce its witness in a timely fashion on the date of trial, then I would request that the case be dismissed."

The court then denied the motion for a continuance and allowed the motion to dismiss. Thereafter, the State moved the court to reconsider its ruling, and the court found that it had erred in denying the State's motion for a continuance. The defendant's charges were then reinstated, a new bench trial was begun and completed, and the defendant was convicted.

The appellate court reversed the defendant's conviction finding that double jeopardy protections precluded defendant's reprosecution for the same offense. (207 Ill. App. 3d 569.) The majority opinion herein reverses the appellate court and affirms the judgment of the circuit court.

The majority concludes that the circuit court's granting of the defendant's motion to dismiss during the first bench trial was really the functional equivalent of an order declaring a mistrial, thus avoiding the double jeopardy issue and legitimizing the second trial. Such assertion will not bear analysis.

A mistrial is defined in Black's Law Dictionary as "[a]n erroneous, invalid, or nugatory trial; a trial of an action which cannot stand in law because of want of jurisdiction, or a wrong drawing of jurors, or disregard of some other fundamental requisite." (Black's Law Dictionary 1195 (3d ed. 1933).) The defendant's first bench trial cannot be characterized as invalid or missing some fundamental requisite. To the contrary, except for a lack of evidence, there was nothing legally deficient from the defendant's first bench trial.

A mistrial would not be called for in a situation where the prosecution had presented insufficient evidence to convict and was unable to go forward. If defense counsel had moved for such, it would have been a demonstration of incompetence. If the trial court had granted a motion for

mistrial, it would have been error to do so. Thus, referring to the dismissal of the case as the functional equivalent of a mistrial is to engage in circumlocution.

The issue in this case is not what might have been but, rather, what was. The prosecution moved for a continuance which was denied. The defendant moved for a dismissal which was granted. Certainly, it would have been in the interest of justice if the trial judge had continued or recessed the trial to allow for the production of the critical witness. That did not happen.

The State concedes and the majority opinion agrees that, at the time of the dismissal, the defendant had been placed in jeopardy as that term is understood. That is so because the trial had begun the three witnesses had testified.

That we are dealing here with a guilty defendant is made manifest from the fact of his conviction at the second trial. Most fair-minded people, myself included, would desire that this guilty defendant be held to account. Opposed to this result, however, is the constitutional principle of double jeopardy. So far as the undeserving defendant is this case is concerned, it would be well if his conviction were sustained. If to reach that desirable result, however, it is necessary to do violence to the time-honored, humane and constitutional principle of double jeopardy, then such result is not warranted. That is to say, the desired result in a particular case does not warrant the abnegation of a valid constitutional principle of broad and general application.

Accordingly, I respectfully dissent.

APPENDIX B

No. 3-89-0653 [FILED NOV. 20, 1990]

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 1990

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

ANTHONY ORTIZ,

Defendant-Appellant.

Appeal from the Circuit Court of Whiteside County, No. 88 CF 535
Honorable JOHN DONALD O'SHEA, Judge Presiding.

Mr. JUSTICE BARRY delivered the opinion of the Court:

Defendant Anthony Ortiz was charged with two counts of aggravated criminal sexual abuse of his girlfriend's nine-year-old daughter. Defendant waived his right to a jury trial, and the prosecution proceeded as scheduled with its case-in-chief on April 24, 1989 before Whiteside County Circuit Judge Wilbur Johnson. At 11:45 a.m., midway through the State's direct examination of the child's mother, the prosecuting assistant state's attorney informed the court that the victim was not available to testify because her father had confused the trial date and

he could not have her at the courthouse for another two and a half hours. The prosecutor moved for a continuance to 2:30 p.m., and defense counsel moved for a dismissal. The court denied the State's motion and granted defendant's.

On April 27, 1989 the prosecutor moved the court to reconsider its ruling. The prosecutor emphasized that there were two other witnesses waiting outside the court room at the time she moved to continue the case. She admitted that she might have pursued her resistance to defendant's motion to dismiss more vigorously by bringing this fact to the court's attention or by proceeding with the witnesses' testimony when the court indicated its inclination to deny a continuance. Instead, the prosecutor had elected to stand on her motion. After reviewing the facts and hearing arguments of counsel, the court found that it had erred in denying the State's motion for a short continuance. The cause was reinstated and set for a trial on May 24, 1989 before Circuit Judge John Donald O'Shea.

At the conclusion of this trial, defendant was found guilty as charged. He was sentenced to a four-year term of probation.

In this appeal, defendant raises a single issue—whether the trial court's dismissal on April 24, 1989 was an acquittal rendering the subsequent trial a violation of defendant's right not to be twice placed in jeopardy for the same offense. The State concedes that jeopardy attached at the April 24 proceedings, but argues that the court's dismissal is not tantamount to an acquittal because it was based on non-factual grounds. Therefore, the State contends, the purpose of the doctrine of double jeopardy is not served by prohibiting the later prosecution.

The double jeopardy protection was recently reviewed by our supreme court in *People v. Deems* (1980), 81 Ill.2d 384, 410 N.E.2d 8, 10. The court there quoted *United States v. Scott* (1978), 437 U.S. 82, 98 S.Ct. 2187, 2192, 57 L.Ed.2d 65:

> " ' "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' "

The court further observed that "[t]he traditional rule is that jeopardy attaches in a bench trial when the first witness is sworn and the court begins to hear evidence." 410 N.E.2d at 11.

There is no question but that defendant here was twice placed in jeopardy for a single offense. We have reviewed the cases cited in support of the State's contention and find them inapposite.

In *United States v. Scott*, defendant moved before and during trial for dismissal of two counts of an indictment on the ground that he had been prejudiced by preindictment delay. Although the trial court did not grant the motion until the close of all evidence, the Supreme Court ruled that a subsequent prosecution would not offend the double jeopardy clause. The court deemed the defendant's motion a "deliberate election on his part to forgo his valued right to have his guilt or innocence determined by the first trier of fact." The Court explained that when a defendant moves for a mistrial because of a judicial or prosecutorial error,

> " '[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error.' *United States v. Dinitz*, 424 U.S. 600, 609, 96 S.Ct. 1075, 1080, 47 L.Ed.2d 267 (1976). But, '[t]he Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions.' *Id.*, at 611, 96 S.Ct. at 1081."

Accordingly, the Court ruled that defendant Scott suffered no injury cognizable under the double jeopardy clause and his reprosecution was a just consequence of his own voluntary choice. 98 S.Ct. at 2198.

Similarly, in *People v. Clauser* (3rd Dist. 1979), 73 Ill. App.3d 145, 391 N.E.2d 793, defendant moved mid-trial to dismiss charges claiming a faulty indictment. Citing *United States v. Scott*, this court affirmed the trial court's denial of defendant's motion to dismiss his reindictment on double jeopardy grounds. We also remanded for reindictment Clauser's co-defendant in *People v. Jones* (3rd Dist. 1979), 75 Ill.App.3d 945, 393 N.E.2d 1372, 1375. We reasoned that, inasmuch as Jones' case presented "a mid-trial termination of criminal proceedings, initiated by the defendant and based upon facts unrelated to the accused's guilt or innocence," reprosecution would not offend the protection against double jeopardy.

The State analogizes defendants' motions for dismissal in *Scott*, *Clauser* and *Jones* to defendant's mid-trial motion here. The critical difference, of course, is that defendant's motion here was not predicated upon a procedural default, but upon the fact that the State did not have sufficient evidence—*i.e.*, the testimony of the victim—at the first trial. Unlike the cases cited by the State, the dismissal here was, indeed, tantamount to an acquittal.

In *People v. Bean* (5th Dist. 1985), 135 Ill.App.3d 336, 481 N.E.2d 888, for example, defendant's prosecution for residential burglary proceeded to a jury trial on September 19, 1983. A jury was sworn and opening statements were presented. Then, at 2:00 p.m., the court granted the State's request for a recess because the victim and her daughter, an eyewitness to the crime, had not arrived at the courthouse. At 4:00 p.m., it became apparent that the witnesses would not be there in time to present their testimony, so the prosecuting attorney requested a further recess until 9:00 a.m. the following morning. At that time, the court suggested that since the State was not ready to proceed, a motion was in order. 481 N.E.2d at 889-891. Defendant moved for a dismissal, and the State moved for a continuance. The court granted the former and denied the latter. The State appealed.

On appeal, the *Bean* court cited with approval *People v. Holman* (1st Dist. 1985), 130 Ill.App.3d 153, 474 N.E.2d 391. In *Holman*, as in *Bean*, the State had attempted to appeal from the circuit court's mid-trial denial of the State's motion for a continuance. The *Holman* court ruled that retrial of a defendant was barred by double jeopardy principles whether proceedings were construed as an improper termination of a trial after a witness had testified or as an acquittal based upon the court's determination that evidence was insufficient to convict. The *Bean* court also distinguished those cases wherein the State had been allowed to appeal from a final disposition favorable to defendant where the basis for such disposition was known to the court before the case was called for trial or the case had for some other reason been improperly brought to trial. (*E.g., People v. Dellecarto* (1978), 67 Ill.App.3d 490, 384 N.E.2d 902; *People v. Rudi* (1984), 103 Ill.2d 216, 469 N.E.2d 580; *People v. Deems* (1980),

81 Ill.2d 384, 410 N.E.2d 8.) In such cases, a midtrial "dismissal for want of prosecution" was appealable under section 114-1 of the Code of Criminal Procedure of 1963.

Having ruled that the trial court's action in *Bean* was not truly a "dismissal," the *Bean* court considered whether it was an "acquittal," analyzing the facts under the criteria set forth in *United States v. Scott*, 437 U.S. 82, 98, 98 S.Ct. 2187, 2197 (quoting *People v. Jones* (1979), 75 Ill.App.3d 945, 393 N.E.2d 1372). Quoting from *Scott*, the court stated:

> " 'a defendant is acquitted only when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged" [citations omitted]. Where the court, before the jury returns a verdict, enters a judgment of acquittal * * *, appeal will be barred only when it is plain that the District Court * * * evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction.' " 481 N.E.2d at 892.

Although the circuit court in *Bean* made no express finding that the State's evidence was insufficient to convict, such finding was implicit in the court's action granting defendant's motion to dismiss when it became clear after jeopardy had attached that the State had no witnesses to present. Thus, the *Bean* court concluded, defendant had been effectively acquitted, and the State had no right to appeal. On this bases, the *Bean* court dismissed the cause for lack of appellate jurisdiction. *See also People v. Thomas* (3rd Dist. 1975), 24 Ill.App.3d 907, 322 N.E.2d 97 (ruling that where a continuance based on unavailability of essential witnesses is denied and the State fails to present evidence sufficient to convict a judgment

of acquittal may be entered by the court on its own motion).

The difference between this case and *Bean* is that here the State presented its "post-trial" arguments attacking the circuit court's denial of the State's motion for a continuance and the court's granting of defendant's motion to dismiss in the trial court, rather than in the appellate court. But the principles expressed in *Bean* apply equally here. It is clear that the State can no more move in the circuit court for "reconsideration" of an order which was in substance an acquittal than it can appeal from such order. Simply stated, once the court denies the State's motion for a continuance and grants a defendant's motion for an acquittal based on failure to produce sufficient evidence to convict, the trial court's determination is thereafter unreviewable. *People v. Mink* (2nd Dist. 1989), 186 Ill.App.3d 316, 542 N.E.2d 468 (*citing People ex rel. Daley v. Crilly* (1985), 108 Ill.2d 301, 312, 483 N.E.2d 1236).

In this case it is apparent that the prosecutor did not learn until midtrial that the victim was not available to testify. The prosecutor's strategy in not pursuing the testimony of the State's other available witnesses is irrelevant. Moreover, whether or not defense counsel was cognizant of their presence outside the court room, there is not indication in the record that without the victim the available witnesses' testimony would have been sufficient to convict. What is relevant is that defendant had been placed in jeopardy and some evidence against him had been presented by the State when proceedings unexpectedly ground to a halt. The court, having determined not to grant the State's motion for a continuance, granted defendant's motion to "dismiss." In effect, the court ac-

quitted defendant for lack of evidence sufficient to convict, regardless of the terminology used. *Scott*; *Bean*.

We hold that under these circumstances double jeopardy protections precluded defendant's reprosecution. Accordingly, we reverse the judgment of the circuit court and vacate defendant's conviction.

The judgment of the circuit court is reversed.

Reversed.

GORMAN and STOUDER, J.J. concurring.